IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 5, 2007 Session

BB&T, a Tennessee banking corporation, as successor in trust to BANKFIRST, v. RODNEY W. MILLIGAN

Direct Appeal from the Circuit Court for Loudon County
No. 7148 Hon. Russell E. Simmons, Circuit Judge

No. E2005-02943-COA-R3-CV - FILED MARCH 7, 2007

Appellant's Rule 60 Tenn. R. Civ. P. Motion asked that the Judgment be set aside on the ground that appellant was not notified of the trial date. The Trial Court overruled the Motion. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Gene A. (Chip) Stanley, Jr., Knoxville, Tennessee, for appellant.

Harvey L. Sproul, Lenoir City, Tennessee, for appellee.

OPINION

Plaintiff brought this action against Hot Rod Bodywear, a Tennessee General Partnership, and Bob Vandergriff, Noel Smith, and Rodney Milligan, as general partners in the Partnership. The action was for a debt allegedly in the amount $35,439.04 owed by the defendants.

Defendant Rodney Milligan answered, denying that he was a partner in Hot Rod at the time of the transaction at issue. Eventually all of the defendants answered, and the parties filed an Agreed Motion for Continuance, asking the Court to continue the trial date from July 28, 2004, due to scheduling conflicts. Another Motion for Continuance was filed by Smith on March 15, 2005, seeking a continuance due to the fact that he had new counsel.

An Order was filed by the Court for Continuance on May 2, 2005, reciting that the trial was continued from March 18, 2005, until May 2, 2005. The Continuance Order was signed by the attorney for Smith, and the certificate of service states that he mailed copies of the same to the other attorneys on March 24, 2005. The Court then entered an Order on June 1, 2005, which stated that a hearing was held on May 3, 2005, and that "upon hearing from the parties, the witness, and weighing all evidence as introduced", the court entered judgment for BB&T for $44,753.09, plus a contractual attorney's fee of $6,682.96, and found that all defendants were jointly and severally responsible.

On June 28, 2005, Appellant filed a Motion for New Trial or Relief from Judgment, stating that his counsel had no knowledge of the trial set for May 2, 2005, and consequently, neither Milligan nor his counsel appeared to defend. He claims that the first knowledge counsel had of the case being rescheduled was when he received a copy of the Order of Continuance on May 3, 2005 from Smith's counsel, which was postmarked April 29, 2005.

A hearing was held on the Motion on October 31, 2005, and the Court stated that he had reviewed the affidavits of Milligan and his attorney, and heard testimony from Smith's counsel, Wayne Henry. The Court found that Mr. Henry testified that when he obtained the continuance, he called the other attorneys to check on a trial date offered by the Judge, and they all agreed to the May 2, 2005, trial date. The Court denied the motion, and affirmed the earlier judgment.

Milligan appealed, and we sent the record back to the Trial Court to determine the proper record for the hearing on the Motion for New Trial or Relief from Judgment, and at that juncture the Trial Court adopted the Proposed Statement of the Evidence filed by plaintiff's attorney. The Statement of Evidence sets forth that Wayne Henry was substituted as counsel for Smith, and that he asked for a continuance of the March 18, 2005, trial date. On March 15, 2005, the Court agreed to the substitution and continuance. Henry stated that he had contacted all parties, and they agreed to a trial date of May 2, 2005, and that he sent the Order of Continuance to all parties on April 29, 2005, "in order to clean up the case file."

On May 2, 2005, all the attorneys were present and ready for trial, except Milligan and his attorney. On May 16, 2005, a proposed Order from the May 2 trial was sent to all parties, including Stanley, who did not respond immediately, but filed a Motion for New Trial or Relief from Judgment on June 28, 2005. The Judgment was entered by the Trial Judge on May 31, 2005, and sent to all parties by the clerk on June 1.

Appellant's issue for this Court, asserts that the Trial Judge erred in not granting him a new trial because of serious illness and the misconduct of counsel for co-defendant in serving an order setting the date for trial of the case.

In our view, the determinative issue is whether appellant's counsel was timely notified and agreed to the trial date of May 2, 2005.

Appellant in his Brief, states that he is relying on Tenn. R. Civ. P. 60.02, and argues that he should be granted relief based upon his surprise regarding the trial date, which he states was due to the misconduct of an adverse party, i.e, Mr. Henry, in failing to properly notify him of the trial date, and relief is justified based on subsection (5), i.e, "any other reason justifying relief".

As our Supreme Court has previously explained:

> In reviewing a trial court's decision to grant or deny relief pursuant to Rule 60.02, we give great deference to the trial court. See *Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993). Consequently, we will not set aside the trial court's ruling unless the trial court has abused its discretion. See id. An abuse of discretion is found only when a trial court has " 'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.' " *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)). The abuse of discretion standard does not permit an appellate court to merely substitute its judgment for that of the trial court. See *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

Henry v. Goins, 104 S.W.3d 475, 479 (Tenn. 2003). The Court further explained that when a party seeks relief from a final judgment pursuant to Rule 60.02, the burden of proof rests with that party. *Id.* at 482.

The Trial Court found that Mr. Henry testified that he called all the parties and they agreed to set the trial on May 2, 2005, and the Trial Court stated that it based its ruling on Mr. Henry's testimony as an officer of the court that he contacted and informed the parties. The Trial Court also found that copies of the Order of Continuance were not mailed until April 29, and the Order was not entered by the court until May 2, 2005.

The trial court's findings of fact are reviewed *de novo* with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). The Trial Court found, in crediting Henry's testimony, that Milligan's attorney was contacted and agreed to the May 2, 2005 trial date. Milligan's attorney in his affidavit stated:

> "Affiant had no knowledge of the trial of this case on or about May 2, 2005. Consequently neither Affiant nor Mr. Milligan appeared at the trial.
>
> . . .
>
> The first knowledge that Affiant had of the rescheduled trial date was on May 3, 2005.

Affiant does not expressly deny in his account that Henry advised affiant of the trial date, but affiant impliedly denies the conversations took place by his statement that he had no

knowledge of the trial date until after the fact. The evidence does not preponderate against the finding of the Trial Court that Milligan's counsel was timely advised of the trial date. The facts of this case do not fall in the ambit of excusable neglect on any other ground under the Rule because the issue is sharply drawn that appellant was either timely notified of the trial date or he was not, and the evidence does not preponderate against the Trial Court's finding.

We affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to Rodney W. Milligan.

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HERSCHEL PICKENS FRANKS, P.J.